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No. 97–1374

In the Supreme Court of the United States

OCTOBER TERM, 1997

WILLIAM J. CLINTON, ET AL., APPELLANTS,

v.

CITY OF NEW YORK, ET AL.

ROBERT E. RUBIN, APPELLANT,

v.

SNAKE RIVER POTATO GROWERS, INC., ET AL.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

BRIEF OF THE UNITED STATES SENATE AS AMICUS CURIAE FOR REVERSAL

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BRIEF OF THE UNITED STATES SENATE AS AMICUS CURIAE FOR REVERSAL

INTEREST OF AMICUS

In 1996, Congress enacted the Line Item Veto Act, Pub. L. No. 104–130, 110 Stat. 1200 (1996) (2 U.S.C. §§ 691 *et seq.* (Supp. II 1996)), as an extension of the Impoundment Control Act of 1974, which established procedures for the President to defer or rescind previously enacted appropriations. Despite its name, the Line Item Veto Act does not give the President authority to veto items in proposed legislation. Rather, through 2004, the Act enhances the President's authority to rescind from enacted laws certain items of spending and taxation, subject to Congress's ultimate control. The district court agreed with appellees that this authority allows the President to repeal laws without action by Congress, violating Article I and the separation of powers. J.S. App. at 22a–31a. This appearance as amicus curiae presents the Senate's view that the Act comports with the Constitution's lawmaking processes and the separation of powers doctrine against undue Executive delegations.[1]

SUMMARY OF ARGUMENT

I. Congress's delegation to the President of authority to cancel items of spending and limited tax benefits builds upon a long history of delegation of control over raising and spending federal funds. From the first appropriation laws enacted under the Constitution, which set ceilings on Executive spending, Congress has repeatedly appropriated funds without mandating that all available funds

[1] Title 2 U.S.C. § 288e authorizes the Senate to direct its Legal Counsel to appear as amicus curiae in its name "in any court of the United States . . . in which the powers and responsibilities of Congress under the Constitution . . . are placed in issue." *See* S. Res. 152, 105th Cong. (1997), 143 Cong. Rec. S12422 (daily ed. Nov. 9, 1997) (directing Senate appearance in this case). Permission to appear is "of right" and may be denied only for untimeliness. 2 U.S.C. § 288*l*(a). The Senate expresses no view on the standing issues in this appeal.

be spent. Similarly, Congress has often imposed taxes while giving the Executive limited discretion to repeal, suspend, or discontinue them. In addition, Congress has given the Executive broad authority to transfer, reduce, or withhold spending for purposes of economy and management and for fiscal or policy reasons. When disputes have arisen over whether the Executive could withhold particular funds, all three branches have understood that the issue of how much discretion the Executive has over the federal budget is a legislative question subject to Congress's determination. In the Line Item Veto Act, Congress determined, after two decades of persistent budget deficits, to give the President temporary authority to cancel specific deficit-increasing items.

II. The cancellation authority exercised in these cases does not give the President lawmaking power contrary to Article I, for his sole authority under the Line Item Veto Act remains to execute the laws in fulfillment of Congress's deficit-reduction policy. The Act fully comports with Article I's bicameralism and presentment requirements, as both the Act itself and all laws subject to the Act will have been passed by both Houses and signed by the President. The President's approval of a measure subject to the Act, in accordance with the Presentment Clause, completes the lawmaking process, for at that moment all three legislative actors have then agreed to make the measure's spending or revenue items permissive. Subsequent Executive cancellations do not effect repeals in violation of Article I, but implement a duly enacted statute in conformance with Congress's will. *See INS v. Chadha*, 462 U.S. 919, 953 n.16 (1983).

The constitutional question presented by the Act is the Article II question whether Congress has vested undue discretion in the President. This Court has established that delegation of the taxing and spending power is subject to no greater constitutional scrutiny than other delegations. *Skinner v. Mid-America Pipeline Co.*, 490 U.S. 212, 223 (1989). The district court erroneously concluded that the cancellation authority was nondelegable because

the President may make permanent changes to spending and tax provisions. Yet the Court has specifically upheld delegations of irreversible authority to alter the force of revenue laws since 1813. *See Field v. Clark*, 143 U.S. 649, 682–83 (1892) (citing *The Brig Aurora*, 11 U.S. (7 Cranch) 382, 388 (1813)). A variety of prior delegations have likewise authorized the President permanently to nullify spending provisions.

The Act's cancellation authority respects Article II's limits on delegation because Congress has prescribed deficit reduction as "'an intelligible principle,'" *Mistretta v. United States*, 488 U.S. 361, 372 (1989) (quoting *J.W. Hampton, Jr., & Co. v. United States*, 276 U.S. 394, 409 (1928)), to guide the President's discretion. Further, Congress has meaningfully constrained the President's discretion through a panoply of limitations and requirements easily more detailed than those accompanying previously sustained delegations.

ARGUMENT

I. THE LINE ITEM VETO ACT BUILDS ON A LONG HISTORY OF DELEGATIONS OF DISCRETION OVER TAXING AND SPENDING

Congress's delegation of authority to cancel taxing and spending builds on two centuries of delegation of discretionary control over revenues and appropriations.

A. Since 1789, Congress Has Given the Executive Discretion Over the Expenditure of Appropriated Funds

"No Money shall be drawn from the Treasury, but in Consequence of Appropriations made by Law." Art. I, §9, cl. 7. From its initial exercise of the spending power, Congress has acted upon its understanding that, while the Appropriations Clause prohibits federal expenditures in the absence of a congressional appropriation, appropriations need not compel expenditure of the appropriated funds. Instead, Congress may make an appropriation permissive.

Congress's first appropriation law, funding the original Executive departments, delegated significant discretion not to spend appropriated funds, by appropriating:

> A sum *not exceeding* two hundred and sixteen thousand dollars for defraying the expenses of the civil list, under the late and present government [and] a sum *not exceeding* one hundred and thirty-seven thousand dollars for defraying the expenses of the department of war.

Act of Sept. 29, 1789, ch. 23, §1, 1 Stat. 95 (emphasis added). The next year Congress funded much of the government under similarly flexible appropriations "not exceeding" specified amounts, in one case granting the President unbridled discretion "to draw from the treasury a sum not exceeding ten thousand dollars, for the purpose of defraying the contingent charges of government." Act of Mar. 26, 1790, ch. 4, §§1, 3, 1 Stat. 104, 105. That Congress intended these laws to confer discretion to spend less than the sum appropriated is evident by contrasting them with a contemporaneous provision directing that "payment of the following sums . . . is hereby authorized *and intended to be made.*" *Id.*, §5, 1 Stat. 105 (emphasis added). By appropriating funds "not exceeding" a fixed amount, early Congresses manifested their constitutional authority to give the Executive discretion to spend funds within whatever range Congress set by law.[2]

In the early 1800s, as the Nation's needs rapidly expanded, Congress delegated more flexibility over spending. In 1803, Congress appropriated $50,000 for the President to build "not exceeding fifteen gun boats . . . for such purposes as in his opinion the public service may require." Act of Feb. 28, 1803, ch. 11, §3, 2 Stat. 206. President Jefferson determined that the "favorable and peaceable turn of affairs on the Mississippi" brought about by the Louisiana Purchase and reopening of the Port of New Orleans had mitigated need for the vessels, and he reserved the funds until the following year. 13 Annals of Cong. 14 (1803); *see* 14 Annals of Cong. 13–14 (1804); *see also* 1 *Messages and Papers of the Presidents* 382–83, 405, 421 (James D. Richardson, ed., 1897) (Jefferson returning other unused funds).

Congress also early began delegating significant spending discretion by authorizing transfers between appropriation accounts. In 1809, Congress authorized the President, "if in his opinion necessary for the public service," to transfer appropriations within a department during a congressional recess. Act of Mar. 3, 1809, ch. 28, §1, 2 Stat. 535, 535–36. In 1820, Congress broadened this authorization to give the President discretion to transfer appropriations of the War and Navy Departments at any time.[3]

As early as 1793, Treasury Secretary Alexander Hamilton's execution of an appropriation had prompted a congressional debate whether, in James Madison's words, the Executive had an inherent constitutional "discretion to be implied in the trust of executing the laws" to "apply the

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[2] In the third annual appropriation law, Congress not only continued to give the Executive discretion by erecting spending ceilings for much of the government, Act of Feb. 11, 1791, ch. 6, §1, 1 Stat. 190, but also confirmed that it intended the Executive to use that discretion, by validating the Executive's past expenditure of less than the appropriated levels: sums appropriated were to be drawn in part from "such surpluses as may remain in the treasury, after satisfying the purposes for which appropriations were made, by the [two prior appropriation acts]." *Id.*

[3] *See* Act of May 1, 1820, ch. 52, §5, 3 Stat. 567, 568. Congress continued to allow transfers of appropriations until 1868 (*see* Act of June 30, 1834, ch. 171, 4 Stat. 742; Act of July 2, 1836, ch. 268, §2, 5 Stat. 77, 78–79; Act of Aug. 26, 1842, ch. 202, §23, 5 Stat. 523, 533), when it repealed all such authority and provided that "no money appropriated for one purpose shall hereafter be used for any other purpose." Act of Feb. 12, 1868, ch. 8, §2, 15 Stat. 35, 36. This century, Congress has again permitted appropriation transfers. *See, e.g.*, Act of June 30, 1932, ch. 314, §317, 47 Stat. 382, 411 (authorizing transfer of up to 12% of appropriation within department); Department of Defense Appropriations Act, 1998, Pub. L. No. 105–56, §8005, 111 Stat. 1203, 1220 (1997) (authorizing conditional transfer of up to $2 billion); Departments of Labor, Health and Human Services, and Education Appropriations Act, 1998, Pub. L. No. 105–78, §304, 111 Stat. 1467, 1505 (1997) (authorizing conditional transfer).

excess of one fund to the aid of a deficient one," or whether such action depended on "special permission of the law" appropriating the funds. 3 Annals of Cong. 938 (1793). Notably lacking from this debate was any suggestion that the Constitution forbade giving the President "special permission" to shift appropriations.

Recognition of Congress's authority to delegate discretion over spending persisted through the 19th century. In 1896, for example, Congress authorized the Secretary of War to expend "not exceeding fifty thousand dollars, or so much thereof as may be necessary," to improve the Mississippi River channel and bank. Act of June 3, 1896, ch. 314, 29 Stat. 202, 229. Attorney General Harmon advised the Secretary "that the permissive form was here used with the deliberate intention of leaving to your judgment the question whether any of the sum named should be expended; and if so, how much." 21 Op. Att'y Gen. 391, 392 (1896). The Attorney General instructed the Secretary "to proceed with the expenditure authorized if, in your judgment, an improvement of that condition may fairly be expected to result. Otherwise you are left at liberty to leave the appropriation unexpended."[4]

B. Grants to the Executive of Discretionary Authority Over Revenue Measures Also Date to the Early Nineteenth Century

Congressional delegations of authority to nullify tax provisions have a similarly long historical pedigree. As early as 1815, Congress authorized the President to repeal various import duty provisions, "[s]uch repeal to take effect in favour of any foreign nation, whenever the President of the United States shall be satisfied that the discriminating or countervailing duties of such foreign nation, so far as they operate to the disadvantage of the United States, have been abolished." Act of Mar. 3, 1815, ch. 77, 3 Stat. 224. Using this authority President Monroe

[4] *Id.*; *see also* 21 Op. Att'y Gen. 414, 415–16 (1896) (same); *compare* 22 Op. Att'y Gen. 295, 297 (1899) (construing another appropriation as mandatory).

issued five proclamations declaring that the statutory duties on imports from a particular nation "are repealed." 3 Stat. app. 1, procl. 3–7 (1818–21).

In 1824 and 1828, Congress authorized the President to "suspend[ ] and discontinue[ ]" statutory duties on foreign vessels, provided he was satisfied that the foreign nation was not imposing discriminating duties on U.S. vessels.[5] In 1830, Congress again enacted a law directing that statutory provisions imposing duties on foreign vessels "shall be repealed: *Provided*, That the President" found that the foreign nation's duties had been abolished. Act of May 31, 1830, ch. 219, § 2, 4 Stat. 425, 425. As customs duties then generated more than 85% of all revenue, *see* Bureau of the Census, U.S. Dep't of Commerce, *Historical Statistics of the United States: Colonial Times to 1970*, H.R. Doc. No. 93–78, pt. 2, at 1106, tables Y 352–53 (1975), Congress had given the President substantial control over the Nation's revenue laws.

Congress has also long delegated authority to impose taxes. In 1890, Congress identified commodities for duty-free import, but gave the President "the power and . . . duty to suspend, by proclamation . . . for such time as he shall deem just" the duty-free provisions on imports from any country imposing "reciprocally unequal and unreasonable" duties. McKinley Tariff Act of 1890, ch. 1244, § 3, 26 Stat. 567, 612. Similar delegations continued this century.[6]

[5] Act of Jan. 7, 1824, ch. 4, § 4, 4 Stat. 2, 3; Act of May 24, 1828, ch. 111, 4 Stat. 308. Pursuant to these and similar delegations, eleven Presidents issued proclamations suspending duties for many countries over sixty years. *See* 4 Stat. app. 815 (1828) (Adams); 4 Stat. app. 814, 814–15, 816 (1829–30) (Jackson); 11 Stat. app. 781, 782 (1835–36) (Jackson); 9 Stat. app. 1001 (1847) (Polk); 9 Stat. app. 1004 (1850) (Fillmore); 11 Stat. app. 795 (1858) (Buchanan); 13 Stat. app. 739 (1863) (Lincoln); 14 Stat. app. 818, 819 (1866–67) (Johnson); 16 Stat. app. 1127, 1130, 1137 (1869–71) (Grant); 17 Stat. app. 954, 956, 957 (1871–72) (Grant); 21 Stat. 800 (1880) (Hayes); 23 Stat. 835 (1884) (Arthur); 24 Stat. 1030 (1886) (Cleveland).

[6] *E.g.*, Act of Aug. 5, 1909, ch. 6, § 2, 36 Stat. 11, 82–83; Flexible Tariff Act of 1922, ch. 356, § 315(a), 42 Stat. 858, 941–42.

C. Since 1905, Congress Has Periodically Given the Executive Broader Spending Discretion to Help Achieve Congress's Budget Goals

As the growth of the federal budget led to increased governmental responsibility for managing the economy through fiscal policy, Congress began giving the Executive broader spending discretion, to help achieve Congress's overall budget goals. Congress first granted general authority over spending to facilitate adherence to mandated spending limits. As early as 1870, Congress had sought to enforce appropriation ceilings through the Antideficiency Act, which made it unlawful "to expend in any one fiscal year any sum in excess of appropriations." Act of July 12, 1870, ch. 251, § 7, 16 Stat. 230, 251. Three decades later, Congress recognized that sound management required Executive control over the pace of spending. Accordingly, Congress amended the Antideficiency Act to authorize agencies regularly to apportion appropriations, to avoid the need for deficiency appropriations late in the year. Act of Mar. 3, 1905, ch. 1484, § 4, 33 Stat. 1214, 1257–58. This across-the-board measure granted Executive agencies a measure of control throughout the budget.

Fifteen years later, the first Director of the Bureau of the Budget, acting under the new Budget and Accounting Act of 1921, ch. 18, 42 Stat. 20, directed departments to treat appropriations as spending ceilings and to establish "General Reserves" by saving unnecessary expenditures. *See* U.S. Bureau of the Budget, *Circulars*, "First Budget Regulations," Budget Circular No. 4 (July 1, 1921). President Harding affirmed that Congress intended appropriations as an upper spending limit, and that to effect savings a "reasonable reserve" should be set aside from each appropriation. *See* Henry P. Seidemann, *The Preparation of the National Budget*, 113 Annals Am. Acad. Pol. & Soc. Sci. 40, 43 (1924).

Similarly, President Roosevelt explained during World War II that agencies should use "good management and

the practice of commonsense economy" to create reserves, while recognizing that Congress had delegated no general authority to withhold funds as "a substitute for item or blanket veto power."[7] Congress met the need for Executive flexibility by delegating selective authority to withhold funds. For example, Congress authorized withholding highway funds if "the War Production Board shall certify that the use of critical material for additional highway construction would impede the conduct of the war." Act of July 13, 1943, ch. 236, § 9, 57 Stat. 560, 563. Then-Senator Harry Truman observed,

> When the Congress appropriates funds it gives the executive branch an authority to incur obligations. Certainly none of us hold that we give a mandate to expend the funds appropriated. We expect the funds to be used only where needed, and not in excess of the amount appropriated, to carry out some phase of law.

89 Cong. Rec. 10362 (1943). At the end of the War, then-President Truman followed this principle in declining to spend funds appropriated for veterans hospitals until veterans had returned, so the hospitals could be built where they settled.[8]

In 1950 Congress again amended the Antideficiency Act to enlarge Executive fiscal control. Congress provided: "In apportioning any appropriation, reserves may be established to provide for contingencies, or to effect savings whenever savings are made possible by or through changes in requirements, greater efficiency of operations, or other developments subsequent to the [appropriation]." Act of Sept. 6, 1950, ch. 896, § 1211, 64 Stat. 595, 765–

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[7] Letter from President Roosevelt to Senator Russell (Aug. 18, 1942), *reprinted in part in First Supplemental National Defense Appropriation Bill for 1944: Hearings on H.R. 3598 Before a Subcomm. of the Senate Comm. on Appropriations*, 78th Cong., 1st Sess. 739 (1943).

[8] *See Executive Impoundment of Appropriated Funds: Hearings Before the Subcomm. on Separation of Powers of the Senate Comm. on the Judiciary*, 92d Cong., 1st Sess. 84–85 (1971) (testimony of William J. Driver, former Administrator of Veterans' Affairs); 1945 Pub. Papers 238.

66. The Executive was to recommend rescission of reserves not required "to carry out the purposes of the appropriation." *Id.*, 64 Stat. 766.

In proposing this revision, the House Appropriations Committee stated that Congress "decides the maximum amounts which must be appropriated for . . . various activities" and that "[a]ppropriation of a given amount for a particular activity constitutes only a ceiling upon the amount which should be expended for that activity." H.R. Rep. No. 81–1797, at 9 (1950). The Executive was responsible "for rendering all necessary service with the smallest amount possible within the ceiling." *Id.* Acting Attorney General Ramsey Clark later called this description "[t]he classic exposition" of a key appropriations law principle: "an appropriation act in itself does not constitute a mandate to spend." 42 Op. Att'y Gen. 347, 350 (1967).

The 1950 appropriation law also authorized Executive control of spending to serve Congress's broad policy goals: Congress directed the Executive to use the Antideficiency Act's reserve authority to reduce total spending by at least $550 million below appropriations, so long as the reductions did not "impair[ ] national defense." Act of Sept. 6, 1950, ch. 896, § 1214, 64 Stat. 768. In compliance, President Truman reserved and recommended rescinding funds for 150 separate items. H.R. Doc. No. 82–182, at 3–8 (1951).

As a yet stronger tool for reducing expenditures, on a number of occasions Congress has given the Executive express authority to override Congress's spending decisions and cancel appropriations. Congress's first such delegation came through broad authority to reorganize the Executive branch. In 1933, Congress gave the President latitude, subject only to a report-and-wait requirement, permanently to abolish, consolidate, or transfer Executive agencies and functions, with appropriations savings to be "impounded and returned to the Treasury." Act of Mar. 3, 1933, ch. 212, § 16, 47 Stat. 1489, 1517–19. President Roosevelt canceled more than $25 million of appropriations, roughly one-half of one percent of total federal

spending. *See* 1933 Pub. Papers 222–25; 77 Cong. Rec. 5707–08 (1933); Bureau of the Census, *supra* p. 7, at 1123, table Y 590. In 1939, in order "to reduce substantially government expenditures" in response to "continued national deficits beginning in 1931," Congress delegated to the President similar reorganization authority (súbject to legislative veto). Reorganization Act of 1939, ch. 36, § 1, 53 Stat. 561, 561. Over the next forty years, Presidents used similar authority[9] to create agencies such as the Department of Health, Education, and Welfare and the Environmental Protection Agency, using other agencies' appropriations.[10]

During the 1960s, when Vietnam War expenditures and domestic needs created a fiscal crisis, Congress delegated even greater spending control to the President, in the form of annual spending ceilings. Beginning with fiscal year 1969, Congress enacted statutory limits requiring the Executive to hold total spending and new obligations below appropriated levels by $6 billion and $10 billion, respectively. Revenue and Expenditure Control Act of 1968, Pub. L. No. 90–364, §§ 202–203, 82 Stat. 251, 271–72. To achieve the reductions, Congress authorized the President unilaterally to reduce or eliminate spending items as he saw fit, excepting only four categories (the Vietnam War, debt service, veterans' and social security benefits). *Id.* Congress provided that the amounts the President reserved "are hereby rescinded." *Id.*, § 203(b), 82 Stat. 272. The President saved billions of dollars with this authority.[11]

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[9] *E.g.*, Reorganization Act of 1945, ch. 582, 59 Stat. 613; Reorganization Act of 1949, ch. 226, 63 Stat. 203; Pub. L. No. 89–554, 80 Stat. 378, 394–98 (1966); *see* 5 U.S.C. § 905, historical and revision notes.

[10] *See* Reorg. Plan No. 1 of 1953, *reprinted in* 67 Stat. 631–32; Reorg. Plan No. 3 of 1970, *reprinted in* 84 Stat. 2086–89.

[11] *See* 115 Cong. Rec. 21277–78 (1969). Congress gave the President similar authority the two succeeding years. Pub. L. No. 91–47, § 401, 83 Stat. 49, 82–83 (1969); Pub. L. No. 91–305, §§ 401, 501, 84 Stat. 376, 405–07 (1970).

D. On Occasion, the Executive Branch Has Sought to Exercise Greater Spending Control Than Congress Had Granted

Congress's refusal to give the President similar discretion after 1971 set the stage for conflict over the President's authority to decline to spend appropriated funds. In addressing these conflicts, all three branches manifested their understanding that the issue of how much discretion the Executive has over expenditures is a legislative matter for Congress to determine in exercising its appropriation power.

Episodic disputes over Executive non-spending had surfaced from the mid-1800s. In 1861, Senator Stephen Douglas had objected to President Buchanan's failure to implement an appropriation to build a custom-house in Springfield, Illinois, complaining that "a hostile Executive" had "refused to obey the law." Cong. Globe, 36th Cong., 2d Sess. 1177 (1861). President Grant threatened in 1876 to disregard provisions in a rivers and harbors appropriation law, declaring that he would refuse to spend money appropriated "for works of purely private or local interest." 9 *Messages and Papers of the Presidents* 4331. He justified his refusal by asserting that these appropriations were not obligatory. *Id.*

The issue of presidential authority over appropriations came to a head under President Nixon. In 1969, his Administration considered withholding educational grants on the theory that the President had inherent constitutional authority to refuse to spend appropriated funds. The Justice Department's Office of Legal Counsel rejected this theory: "[W]e conclude that the President does not have a constitutional right to impound [ ] funds notwithstanding a Congressional direction that they be spent."[12]

[12] Memorandum of Ass't Att'y Gen. William H. Rehnquist, Re Presidential Authority to Impound Funds Appropriated for Assistance to Federally Impacted Schools (Dec. 1, 1969), *reprinted in Executive Impoundment of Appropriated Funds: Hearings Before the Subcomm. on Separation of Powers of the Senate Comm. on the Judiciary*, 92d Cong., 1st Sess. 279, 282 (1971) [hereinafter OLC Memo.].

While agreeing with Acting Attorney General Clark "that an appropriation act permits but does not require the executive branch to spend funds," the Office of Legal Counsel opined that "this is basically a rule of construction," subservient to Congress's will for each appropriation: Whether the Executive has discretion over a particular spending measure is an issue solely of congressional intent, and the President has whatever discretion Congress has given. *Id.*

In the years following, Congress determined not to give the President the discretion it had given in prior annual spending ceilings. Nevertheless, the Nixon Administration embarked on an ambitious course of spending cuts, impounding funds for a wide variety of programs, notwithstanding the Office of Legal Counsel opinion. As a result, in the early 1970s courts in scores of cases were required to decide whether the Executive had the authority it asserted not to spend appropriated funds.

To resolve these cases, the courts uniformly looked to Congress's intent, upholding Executive refusals to spend if Congress had conferred such discretion, but otherwise invalidating impoundments and ordering funds released. In *Train v. City of New York*, 420 U.S. 35 (1975), this Court interpreted a statutory mandate that sums authorized for sewage facilities "shall be allotted," *id.* at 42, to require the Executive to release all funds. Rejecting the Executive's claim that Congress had legislated "a maximum, but no minimum," *id.* at 43, the Court made no suggestion that, had Congress delegated such "limitless power to withhold funds from allotment and obligation," *id.* at 46, this would have been constitutionally improper. Nor did the Court need to construe this delegation "narrowly to avoid constitutional problems." *National Cable Television Ass'n v. United States*, 415 U.S. 336, 342 (1974); *see Industrial Union Dep't v. American Petroleum Inst.*, 448 U.S. 607, 646 (1980) (opinion of Stevens, J.). Rather, the Court simply interpreted the statute to conclude that Congress had conferred no such discretion. *Train*, 420 U.S. at 42–49. Lower courts similarly resolved

scores of cases without a hint that such delegations presented any issue other than statutory construction, consistently recognizing that the Executive had as much or as little authority to withhold appropriated funds as Congress had granted.[13]

E. Congress Legislated Firm Controls on Executive Spending Discretion in the Impoundment Control Act

The frequency with which the Nixon Administration withheld funds that Congress had intended be spent led Congress to enact the Impoundment Control Act of 1974 ("ICA"), Pub. L. No. 93–344, tit. X, 88 Stat. 332 (codified as amended at 2 U.S.C. §§ 681–688), to ensure that the Executive would withhold only appropriations intended as permissive. Congress sought to control two forms of impoundments: deferrals, or spending delays during a fiscal year, and rescissions, or permanent withholdings of appropriated funds. *Id.*, §§ 1011–1013, 88 Stat. 333–35. Congress authorized Executive deferrals, upon reporting to Congress and subject to legislative veto, *id.*, § 1013, 88 Stat. 334–35, but permitted the President only to propose rescissions, to be effective only if Congress affirmatively approved, using expedited procedures, *id.*, § 1017, 88 Stat. 337–39.

After invalidation of the legislative veto, *INS v. Chadha*, 462 U.S. 919 (1983), the Executive began to use deferrals aggressively on the view that severance of the legislative veto left the President with expanded deferral authority, subject to disapproval only through enactment

[13] *See, e.g., State Highway Comm'n v. Volpe*, 479 F.2d 1099, 1109–14 (8th Cir. 1973); *Pennsylvania v. Weinberger*, 367 F. Supp. 1378, 1381–82 (D.D.C. 1973); *Pealo v. Farmers Home Admin.*, 361 F. Supp. 1320, 1323–24 (D.D.C. 1973); *Minnesota v. Weinberger*, 359 F. Supp. 789, 791 (D. Minn. 1973); *Local 2677, A.F.G.E. v. Phillips*, 358 F. Supp. 60, 75–79 (D.D.C. 1973). In the one case in which the D.C. Circuit found that Congress *had* authorized the Executive to withhold appropriated funds, the court evidenced no concern that such discretion raised a constitutional issue. *Pennsylvania v. Lynn*, 501 F.2d 848 (D.C. Cir. 1974).

of a new law. The District of Columbia Circuit rejected this view and struck the entire deferral mechanism, finding the legislative veto inseverable. *City of New Haven v. United States*, 809 F.2d 900 (D.C. Cir. 1987). In light of the loss of control by legislative veto, Congress amended the ICA to limit the Executive's deferral authority to purposes permitted by the Antideficiency Act. Pub. L. No. 100–119, § 206, 101 Stat. 754, 785–86 (1987). The amended ICA allowed deferrals only "to provide for contingencies," "to achieve savings made possible by or through changes in requirements or greater efficiency of operations," or as otherwise provided by law, and permitted the Executive only to propose rescissions. 2 U.S.C. § 684(b).

F. For Over a Decade, Congress Has Given the Executive Particular Authority Over Spending to Help Achieve Deficit Reduction

Ballooning federal deficits led Congress to fashion further tools to control spending. In 1985, Congress enacted the Gramm-Rudman-Hollings Act, authorizing the President to issue a "sequestration" order canceling, pro rata, appropriations for a broad range of programs, to meet mandated deficit targets. Balanced Budget and Emergency Deficit Control Act of 1985, Pub. L. No. 99–177, tit. II, § 252, 99 Stat. 1038, 1072–78. After this Court invalidated the Comptroller General's role in sequestration, *Bowsher v. Synar*, 478 U.S. 714 (1986), Congress amended the Act to delegate the sequestration function solely to the Executive. Balanced Budget and Emergency Deficit Control Reaffirmation Act of 1987, Pub. L. No. 100–119, tit. I, § 102, 101 Stat. 754, 754–75. When the deficit targets proved unattainable, Congress again amended the Act to replace the fixed targets with prospective annual spending limits on appropriations legislation, and budget-neutrality requirements for other legislation, enforced again through Executive sequestration. Budget Enforce-

ment Act of 1990, Pub. L. No. 101–508, tit. XIII, §§ 13101, 13111, 104 Stat. 1388–573, 1388–574 to 1388–607.

As deficits persisted, Congress considered augmenting the existing rescission and sequestration regimens. One proposal, called "expedited rescission," was to amend the ICA to streamline the process for Congress to approve proposed rescissions. *See, e.g.*, H.R. 2164, 102d Cong. (1991). An alternative, termed "enhanced rescission," was to make Executive rescissions automatic in defined circumstances, subject to congressional disapproval. *See, e.g.*, S. 206, 104th Cong. (1995); H.R. 78, 102d Cong. (1991). Other proposals included amending the Constitution to give the President a line-item veto, *see, e.g.*, H.J. Res. 6, 104th Cong. (1995); H.J. Res. 4, 103d Cong. (1993), and adopting congressional procedures for presenting each spending provision to the President for approval or veto as a separate bill, *see, e.g.*, S. 137, 104th Cong. (1995); S. 238, 104th Cong. (1995). While these latter, more sweeping proposals did not gain a majority, support for amending the ICA grew, until in the Line Item Veto Act Congress gave the President "enhanced rescission," or cancellation, authority.

The President first exercised authority under the Act on August 11, 1997, when he canceled three provisions, including the two now at issue: section 4722(c) of the Balanced Budget Act of 1997, Pub. L. No. 105–33, 111 Stat. 251, 515, an item of "new direct spending" that would have increased federal Medicaid funding to New York; and section 968 of the Taxpayer Relief Act of 1997, Pub. L. No. 105–34, 111 Stat. 788, 895–96, a "limited tax benefit" that would have allowed owners of certain agricultural processors to defer recognition of gain on the sale of stock. The Taxpayer Relief Act specifically identified both section 968 and another tax provision canceled the same day as "limited tax benefits" subject to cancellation under the Line Item Veto Act. *See id.*, § 1701, 111 Stat. 1099, 1101.

Since August, the President used the Act to cancel seventy-eight annual appropriations items,[14] accounting for almost $500 million in federal spending.[15] Congress responded under the Act by enacting one law (over a Presidential veto) disapproving the cancellation of thirty-eight military construction spending items.[16]

II. THE LINE ITEM VETO ACT IS A CONSTITUTIONAL EXERCISE OF THE TAXING AND SPENDING POWER

Congress's grant of limited authority to cancel the effect of discrete spending and revenue provisions is consistent with the lawmaking requirements of Article I and the constitutional separation of powers, as expressed in the doctrine against undue delegation.

A. The Line Item Veto Act Respects Article I Lawmaking Requirements

"Explicit and unambiguous provisions of the Constitution prescribe and define the respective functions of the Congress and of the Executive in the legislative process." *Chadha*, 462 U.S. at 945. Article I, section 7, prescribes the two fundamental requisites for legislative action: "bicameral passage followed by presentment to the President." *Id.* at 954–55. These requirements "serve essential constitutional functions" and "represent[] the Framers' decision that the legislative power of the Federal Government be exercised in accord with a single, finely wrought and exhaustively considered, procedure." *Id.* at 951.

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[14] 62 Fed. Reg. 52452–69 (1997) (38 military construction items); *id.* at 53704–10 (14 Defense items); *id.* at 54564–68 (8 Energy items); *id.* at 59766–69 (7 VA/HUD items); *id.* at 59769–71 (3 Transportation items); *id.* at 62682–83 (2 Interior items); *id.* at 62683–86 (5 Agriculture items); *id.* at 64130 (1 Commerce, Justice, State item).

[15] *See Clinton's Line-Item Vetoes Show Light Touch*, CQ Monitor, Dec. 8, 1997, at 7. Although a significant sum, this is less than one-tenth percent of total appropriations. *Id.*

[16] Pub. L. No. 105–159, 112 Stat. 19 (1998). Proposed legislation to disapprove the two cancellations at issue here was not acted upon. *See* S. 1157, 105th Cong. (1997); H.R. 2444, 105th Cong. (1997); S. 1144, 105th Cong. (1997); H.R. 2436, 105th Cong. (1997).

Both Article I requirements have been met when the President cancels taxing or spending items pursuant to the Line Item Veto Act. The Act itself, obviously, was agreed to by both Houses and the President. Furthermore, as the district court recognized, *see* J.S. App. 24a, both the Balanced Budget Act of 1997 and the Taxpayer Relief Act of 1997 became law in compliance with Article I. Indeed, by its terms the Act's cancellation authority applies only to measures "signed into law pursuant to Article I, section 7." 2 U.S.C. §691(a) (Supp. II 1996). This limitation ensures that the President cannot use the Act to augment his "limited and qualified power to nullify proposed legislation by veto," *Chadha*, 462 U.S. at 947, which, as always, must be exercised with regard to an entire law or not at all.

Despite the Act's adherence to Article I's "[e]xplicit and unambiguous provisions," *id.* at 945, the district court believed that the Act violates Article I by permitting the President in effect to repeal or alter laws.[17] Although the *President* manifestly cannot change laws unilaterally, nothing in Article I deprives *Congress* of the power by law to authorize Executive action that may alter the effect of other laws. Indeed, in *Chadha* this Court dismissed the similar argument that allowing the Executive to exercise delegated authority, there under the Immigration and Nationality Act, "will sanction 'lawmaking by the Attorney General. . . . Why is the Attorney General exempt from submitting his proposed changes in the law to the full bicameral process?'" 462 U.S. at 953 n.16 (quoting petitioner's brief; omission in original). Noting that "some administrative agency action—rulemaking, for example—may resemble 'lawmaking,'" the Court held, "Executive

[17] The title of the "Line Item Veto Act" provides no support for this position. While "the title of a statute or section can aid in resolving an ambiguity in the legislation's text," *INS v. National Center for Immigrants' Rights*, 502 U.S. 183, 189 (1991), titles and headings do not control over statutory text and "cannot undo or limit that which the text makes plain." *Brotherhood of Railroad Trainmen v. Baltimore & O.R.R.*, 331 U.S. 519, 529 (1947).

action under legislatively delegated authority that might resemble 'legislative' action in some respects is not subject to the approval of both Houses of Congress and the President for the reason that the Constitution does not so require." *Id.* "The bicameral process is not necessary as a check on the Executive's administration of the laws because his administrative activity cannot reach beyond the limits of the statute that created it—a statute duly enacted pursuant to Art. I, §§ 1, 7." *Id.*

The President exercises the Act's cancellation authority not as an act of legislative power, but in fulfillment of his Article II duty to execute the laws. Once the President signed into law the bills at issue in these cases, he had no more lawmaking responsibilities regarding them. The legislative process was then complete, for "a bill when so signed becomes from that moment a law." *La Abra Silver Mining Co. v. United States*, 175 U.S. 423, 454 (1899). "[F]rom that moment," the President had an Article II duty to execute both the Line Item Veto Act *and* the newly enacted spending or revenue law, which Congress passed *subject to* the Line Item Veto Act. Once Congress presented, and the President signed, the bills at issue here, the constitutional value underlying the Presentment Clause—that all participants in the lawmaking process agree to precisely the same statutory text—had been achieved. The House, the Senate, and the President had agreed, understood, and intended that each spending item and identified tax benefit item in those laws be subject to cancellation, within the limits of the Act. The resulting cancellations accordingly do not implicate the "finely wrought" procedure of Article I. *Cf. Skinner v. Mid-America Pipeline Co.*, 490 U.S. 212, 221 (1989) (Article I's Origination Clause "implies nothing about the scope of Congress' power to delegate discretionary author-

ity under its taxing power once a tax bill has been properly enacted").[18]

B. The Line Item Veto Act Assigns Delegable Responsibility to the President

The constitutional principle that ensures that a delegation to the Executive respects the separation of powers is not Article I, but the delegation doctrine. As this Court explained in *Chadha,* after rejecting the claim that the Executive was legislating in violation of Article I, "[t]he constitutionality of the Attorney General's execution of the authority delegated to him by [statute] involves only a question of delegation doctrine." 462 U.S. at 953 n.16.

That the Line Item Veto Act delegates authority over taxation and spending does not alter the applicability of the delegation doctrine. In *Mid-America Pipeline,* the Court noted the long constitutional pedigree of delegations of taxing authority, 490 U.S. at 221–22 (citing *J.W. Hampton,* 276 U.S. 394, and *Field v. Clark,* 143 U.S. 649, 683–89 (1892)), and affirmed "that the delegation of discretionary authority under Congress' taxing power is subject to no constitutional scrutiny greater than that we

[18] The Act's precise operation reinforces its conformity with Article I, as the manner in which the President exercises cancellation authority differentiates this delegation from lawmaking. Under the Presentment Clause, if the President does not approve a bill, "he shall return it, with his Objections to that House in which it shall have originated, who shall enter the Objections at large on their Journal, and proceed to reconsider it." Art. I, § 7, cl. 2. In contrast, under the Line Item Veto Act, the President sends both Houses a "special message," printed not in their Journals but in the Federal Register, where administrative actions are recorded. 2 U.S.C. § 691a(c)(2) (Supp. II 1996). If Congress wishes to disapprove a cancellation, it does so not by the originating House's reconsidering the original bill presented to the President, as when overriding a veto, but by passing a fresh bill. 2 U.S.C. § 691d (Supp. II 1996). Furthermore, the actions the President takes to exercise his cancellation authority, such as searching congressional committee reports and considering the legislative history of provisions subject to cancellation, are precisely the type of Executive actions the Executive takes after signing a bill into law to implement Congress's will. *See Bowsher,* 478 U.S. at 733 ("[i]nterpreting a law . . . is the very essence of "execution" of the law").

have applied to other nondelegation challenges." *Id.* at 223.

Spending authority is equally subject to delegation. This Court has never "held *any* legislative power, much less that over appropriations, to be nondelegable due to its 'core function' status," and "[n]o constitutional provision distinguishes between 'core' and 'non-core' legislative functions." *Synar v. United States,* 626 F. Supp. 1374, 1385 (D.D.C.) (three-judge court) (per curiam), *aff'd on other grounds sub nom. Bowsher v. Synar,* 478 U.S. 714 (1986); *see Loving v. United States,* 517 U.S. 748, 116 S. Ct. 1737, 1748 (1996); *Milk Industry Foundation v. Glickman,* 132 F.3d 1467, 1473–75 (D.C. Cir. 1998) (upholding delegation under Compact Clause).

The only constitutional restriction unique to Congress's "power of the purse" is the Appropriations Clause, art. I, § 9, cl. 7, which "'means simply that no money can be paid out of the Treasury unless it has been appropriated by an act of Congress.'" *OPM v. Richmond,* 496 U.S. 414, 424 (1990) (quoting *Cincinnati Soap Co. v. United States,* 301 U.S. 308, 321 (1937)). Because the Clause "was intended as a restriction upon the disbursing authority of the Executive department," it "is without significance" when Congress has legislated spending discretion. *Cincinnati Soap,* 301 U.S. at 321; *accord* Joseph Story, 2 *Commentaries on the Constitution of the United States* § 922 (Fred B. Rothman & Co. 1991) (1833) ("clause is a limitation, not upon the powers of congress, but upon the acts of the executive"). The Court thus has recognized Congress's power to appropriate funds without specifying "the particular uses to which the appropriated money is to be put":

> That Congress has wide discretion in the matter of prescribing details of expenditures for which it appropriates must, of course, be plain. Appropriation and other acts of Congress are replete with instances of general appropriations of large amounts, to be allotted and expended as directed by designated government agencies. . . . The constitu-

> tionality of this delegation of authority has never been seriously questioned.[19]

The Line Item Veto Act fully satisfies the Appropriations Clause, because Congress still appropriates every penny available for spending. The President has discretion only to *decline* to spend funds that Congress *has* appropriated, not to *spend* funds Congress has *declined* to appropriate.

The Act's delegation of discretion not to spend appropriated funds is far from novel. As described in Part I, Congress has authorized the Executive to decline to spend appropriated funds since its first appropriations under the Constitution. The Justice Department has concurred that "Congress could provide in its appropriation that the money need not be spent. Or it could enact an appropriation, and then provide in contemporaneous or subsequent legislation that the money need not be spent. . . ." OLC Memo., *supra* note 12, at 282. In construing the appropriation power:

> "A legislative practice such as we have here, evidenced not by only occasional instances, but marked by the movement of a steady stream for a century and a half of time, goes a long way in the direction of proving the presence of unassailable ground for the constitutionality of the practice, to be found in the origin and history of the power involved, or in its nature, or in both combined."

Cincinnati Soap, 301 U.S. at 315 (quoting *United States v. Curtiss-Wright Export Corp.,* 299 U.S. 304, 327–28 (1936)).

Despite this long history of permissive appropriations, the district court accepted appellees' claim that the Line

[19] *Cincinnati Soap,* 301 U.S. at 321–22. Recognition of Congress's authority to give the Executive discretion through lump-sum appropriations traces from the earliest period under the Constitution, *see* 3 Annals of Cong. 889–90 (1793), to the present, *see Lincoln v. Vigil,* 508 U.S. 182, 192 (1993). For example, in 1937 Congress appropriated $1.5 billion (in addition to unexpended prior balances), roughly one-fifth of the entire federal budget at the time, "to be used in the discretion . . . of the President" for a variety of domestic projects. Emergency Relief Appropriation Act of 1937, ch. 401, tit. I, § 1, 50 Stat. 352, 353.

Item Veto Act's authority is nondelegable because it gives the President "an inherently legislative function, namely, the authority to permanently shape laws and package legislation." J.S. App. 29a. The court sought to distinguish the Act from prior delegations on the basis that cancellations cannot be reversed even if the President changes his mind, concluding that "[s]uch delegations are unprecedented." J.S. App. 30a.

The district court disregarded numerous instances in which Congress has authorized the Executive permanently to alter the force of laws. This Court has approved such delegations since 1813, when it upheld the President's authority to "revive[ ]" a law restricting foreign commerce, *which by its terms had expired,* so that it would again "have full force and effect." *The Brig Aurora,* 11 U.S. (7 Cranch) 382, 384, 388–89 (1813). Assessing this opinion in 1892, Justice Harlan noted that, facing a claim "that Congress could not transfer legislative power to the President," the Court had "deci[ded] that it was competent for Congress to make the revival of an act depend upon the proclamation of the President." *Field v. Clark,* 143 U.S. at 682–83.

At issue in *Field v. Clark* was the constitutionality of the President's authority to suspend provisions of the McKinley Tariff Act of 1890 (*see supra* p. 7). In upholding this delegation, Justice Harlan recited with approval the history since 1815 of delegations of authority to trigger not only suspensions, but also *repeals,* of tax provisions and of Presidents' uses of this authority. 143 U.S. at 685–87. As Justice Harlan observed, these precedents authorizing the President to alter the force and effect of tax laws, "from the organization of the government to the present time," are "entitled to great weight." *Id.* at 683. Three decades later, in upholding the Flexible Tariff Act of 1922, which delegated authority for the President to alter tariffs, the Court again rejected the argument that Congress cannot delegate "power to levy taxes and fix customs duties." *J.W. Hampton,* 276 U.S. at 409. While relying on these cases for the tautology that legislative

power cannot be delegated, J.S. App. 28a–29a, the district court ignored the substance of the delegations the Court approved.

Moreover, contrary to the district court's belief, Congress has also authorized the President permanently to repeal or nullify provisions of spending laws, to achieve greater fiscal economy, at least since its grant of reorganization authority in 1933, *see supra* pp. 10–11. In the 1960s, Congress authorized the President to reduce federal spending billions of dollars below appropriated levels through unilateral rescission. *See supra* p. 11. In the 1980s, the Gramm-Rudman-Hollings Act authorized the President "permanently [to] cancel[ ]" a portion of all covered appropriations. Pub. L. No. 99–177, § 252(a)(4), 99 Stat. 1074; *see supra* p. 15. In *Synar v. United States,* the three-judge district court flatly rejected the claim that this delegation was "*per se* invalid because it allows administrators to 'nullify' or 'override' laws," concluding that "the authority delegated by the Act does not differ in kind from that approved in prior cases." 626 F. Supp. at 1387.

Congress has also given this Court statutory authority effectively to repeal or nullify laws. The Rules Enabling Acts not only empower the Court to promulgate rules of practice and procedure for civil proceedings (and formerly criminal proceedings) in the lower courts, but also provide that "[a]ll laws in conflict with such rules shall be of no further force or effect." 28 U.S.C. § 2072(b) (1994) (civil); 18 U.S.C. § 3771 (1982) (repealed) (criminal). The Court has recognized that the force of these provisions is that a "prior inconsistent statute [is] *deemed to have been repealed*." *Davis v. United States,* 411 U.S. 233, 241 (1973) (emphasis added); *see also Sibbach v. Wilson & Co.,* 312 U.S. 1, 10 (1941) (explaining that Court's rules "repeal" statute).

As in each of these prior cases, Executive action pursuant to the Line Item Veto Act, although rendering canceled provisions of no legal force or effect, fulfills, rather than defeats, Congress's will. Congress has expressly legislated that each dollar amount of discretionary budget authority, each new item of direct spending, and each limited tax benefit enacted over the life of the Act (unless exempted from the Act) are to be permissive and subject to cancellation within the limits of the Act. Accordingly, the President's decisions at issue here to cancel the new direct spending provision paying New York State additional Medicaid funds, and the limited tax benefit permitting deferral of recognition of gain on certain sales of agricultural stock, do not negate Congress's legislated will, but execute Congress's delegated statutory authority.

C. The Line Item Veto Act Comports With the Doctrine Against Undue Delegation

The Line Item Veto Act serves the separation of powers through "measured cooperation between the two political branches of the Government, each contributing to a lawful objective through its own processes." *Loving,* 116 S. Ct. at 1751. Congress's delegation is "'constitutionally sufficient,'" as Congress has "'clearly delineate[d] the general policy, the public agency which is to apply it, and the boundaries of this delegated authority.'" *Mistretta v. United States,* 488 U.S. 361, 372–73 (1989) (quoting *American Power & Light Co. v. SEC,* 329 U.S. 90, 105 (1946)). Based upon its judgment about the serious economic threat of budget deficits, Congress has made all spending and tax provisions covered by the Act permissive for five days after enactment. In establishing deficit reduction as its paramount objective, Congress has fulfilled "[t]he essentials of the legislative function," *Yakus v. United States,* 321 U.S. 414, 424 (1944), by "'lay[ing] down by legislative act an intelligible principle'" to guide the President's discretion. *Mistretta,* 488 U.S. at 372 (quoting *J.W. Hampton,* 276 U.S. at 409). Because of its view that the authority delegated by the Act was nondelegable, the district court deemed it "irrelevant whether the Line Item Veto Act provides intelligible principles." J.S. App. 31a. The court thus failed to appreciate the significant constraints accompanying this delegation.

Key statutory features confine the President's discretion. He can make cancellations only during the five days after a measure is enacted, rather than throughout the year. The cancellation authority is irreversible, precluding the President from canceling funding, only to restore it later. The cancellation authority is limited to total rescission. Thus, the President is put to the difficult choice of canceling an item entirely or not at all. This "all or nothing" requirement, H.R. Conf. Rep. No. 104–491, at 32, 33 (1996), gives the President far less discretion than would, for example, a general grant of authority to reduce expenditures to any level he sees fit. Finally, to promote its legislative goal of deficit reduction, Congress enacted an intricate "lockbox" mechanism, 2 U.S.C. §691c (Supp. II 1996), under which the Office of Management and Budget must "lock in" the savings resulting from a cancellation, through adjustments in the calculations it submits to Congress under the Gramm-Rudman-Hollings Act. This lockbox requirement "ensures that the President does not simply cancel . . . in order to increase spending in other areas." H.R. Conf. Rep. No. 104–491, at 20–21.[20]

[20] Requiring the President to use his cancellation authority within five days of signing the underlying bill, 2 U.S.C. §691(a)(B), serves a substantial administrative purpose. Because spending cancellations, which are the vast majority, are limited to total rescission, any potential of cancellation after a fiscal year begins would render agencies legally unable to obligate any funds at the beginning of the year. Otherwise, if a spending item came to be canceled, agencies already would have spent some of the appropriated, but now rescinded, funds, in violation of the Antideficiency Act. In addition, a cancellation necessarily creates a period of uncertainty whether Congress will act legislatively to disapprove it. In that interval, agencies whose funds are affected by cancellations, along with their employees, beneficiaries, and contractors, and, for revenue provisions, affected taxpayers, will be burdened by that uncertainty. To avoid "unnecessarily prolong[ing] the process," while still giving the President time to gather "all supporting material" and make the required determinations, H.R. Conf. Rep. No. 104–491, at 22, Congress prudently limited cancellations to five days after enactment.

Congress also made a number of critical legislative judgments limiting the objects of cancellation. It exempted two-thirds of the budget from the reach of presidential discretion by excluding all current levels of entitlement spending from cancellation. 2 U.S.C. §§691(a)(2), 691e(5), (8) (Supp. II 1996). Only increases in entitlements, such as the New York State Medicaid provision, are subject to the Act. Congress also limited cancellations to dollar amounts of appropriations or limited tax benefits, not broad revenue items or substantive provisions. *See* 2 U.S.C. §691e(4)(A) (Supp. II 1996). By barring cancellation of substantive provisions or "fencing language," Congress ensured "that the President cannot use this authority to modify or alter any aspect of the underlying law." H.R. Conf. Rep. No. 104–491, at 20.

Moreover, the determinations and assessments that the President must make as part of his cancellation decisions provide a robust context for reviewing his exercise of discretion. As required by the Act, 2 U.S.C. §691(a), the President determined and reported to Congress that each cancellation would reduce the federal budget deficit, would not impair any essential government functions, and would not harm the national interest, and for each cancellation the President also provided the required supporting explanations. For instance, the President explained that the New York State Medicaid provision "would have given preferential treatment to only one State" and "established a costly precedent," 62 Fed. Reg. 43263 (1997), thus implementing the requirement that he consider the "States and congressional districts . . . affected" and the "estimated fiscal, economic, and budgetary effect of the cancellation," 2 U.S.C. §691a(b) (Supp. II 1996). In canceling the tax benefit for sellers of agricultural stock, the President described the effect of this cancellation on "the objects, purposes and programs" of the provision, *id.*, when he explained that it "would not have benefitted farmers generally" and "would have created opportunities for the complete avoidance of tax," 62 Fed. Reg. 43267 (1997). If Congress was dissatisfied with these

explanations, it could have acted to disapprove the cancellations, as it did for almost one-half of the items canceled this year. *See supra* p. 17.[21]

Notwithstanding the substantial legislative judgments and standards embodied in the Act, appellees sought below to identify attributes of the Act differentiating it from prior delegations. They noted that the use of cancellation authority is irreversible; that the President must exercise the cancellation authority soon after signing an underlying bill, without any intervening changes in circumstance; and that cancellation is not mandatory, allowing the President to elect to use it to further his own policy goals. The Court's substantial delegation jurisprudence identifies none of these features as injurious to the constitutional legitimacy of a delegation; nor is the Line Item Veto Act the first delegation with these attributes.

The district court was particularly influenced by the assertion that the irreversible nature of a cancellation was "unprecedented," J.S. App. 30a, despite a variety of prior delegations, dating from the early 1800s, authorizing similarly irreversible Executive action. These delegations, including the 1810 law reviewed in *The Brig Aurora,* 11 U.S. (7 Cranch) at 388–89 (*see supra* p. 23), and the 1815 and 1830 statutes relied upon by Justice Harlan in *Field v. Clark,* 143 U.S. at 685–87 (*see supra* pp. 6–7, 23), allowed the President not merely to suspend or adjust, but permanently to *repeal* or *revive,* statutory provisions. The

[21] Of course, even without the disapproval process, Congress retains ultimate control over all appropriation and tax decisions. Because the Act applies only to laws enacted after January 1, 1997, and sunsets on December 31, 2004, 2 U.S.C. § 691 note (Supp. II 1996), with each spending or tax measure enacted over these eight years, Congress makes a fresh decision whether or not to make that measure subject to the Act. *Cf. Raines v. Byrd,* 117 S. Ct. 2312, 2320 (1997) (noting for purposes of standing that Congress can vote "to exempt a given appropriations bill (or a given provision in an appropriations bill) from the Act; again, the Act has no effect on this process"). Each time Congress makes the legislative judgment to let the Act apply, it has chosen to make the individual spending and tax benefit items in that law permissive.

1960s spending ceilings (*see supra* p. 11) and the Gramm-Rudman sequestration authority upheld by the three-judge district court in *Synar,* 626 F. Supp. at 1377, 1382–91 (*see supra* p. 24), also delegated similarly irreversible or permanent authority.

Furthermore, *all* exercises of spending authority are by definition irreversible, once the funds are spent. Through the Act's lockbox mechanism, Congress in effect has mandated that all canceled spending or tax items be transferred to deficit reduction. Once "spent" on deficit reduction, cancellations are irreversible, just as any Executive action applying an appropriation to a particular purpose is, once effectuated, irreversible. That the President cannot reverse cancellations in fact operates as a *constraint* on the delegation, not an expansion.

The contention that a proper delegation requires a lapse of time before exercise, in which circumstances change, also lacks historical support. In fact, one of the most important delegations of recent times, the authority given President Nixon in 1970 to impose wage-price controls, depended on neither an interval of time nor changed conditions after Congress's grant of authority. A three-judge district court upheld Congress's delegation of discretion to impose wage-price controls, despite the fact that the delegated authority became effective immediately upon enactment, was based on already-prevailing economic conditions, was to expire in six months, and was extended for periods of as short as two months, to ensure that Congress could keep "close control." *Amalgamated Meat Cutters v. Connally,* 337 F. Supp. 737, 754 & n.30 (D.D.C. 1971), *cited with approval in Eastlake v. Forest City Enters.,* 426 U.S. 668, 675 (1976).

Similarly, that the President has discretion whether to exercise cancellation authority, and that he may use the authority to further his policy goals, neither suggest any constitutional defect nor distinguish the Line Item Veto Act from such prior delegations as the sweeping authority upheld in *Amalgamated Meat Cutters* "'to issue such orders and regulations as [the President] may deem appro-

priate to stabilize prices, rents, wages and salaries.'" *Id.* at 745 (quoting Economic Stabilization Act of 1970, Pub. L. No. 91–379, tit. II, § 202, 84 Stat. 799, 799–800). As the Court has recently reaffirmed, "'Congress is not confined to that method of executing its policy which involves the least possible delegation,'" *Mistretta,* 488 U.S. at 379 (quoting *Yakus,* 321 U.S. at 425–26), and it is no indictment of a law like the Line Item Veto Act that Congress has delegated "authority that it could exercise itself," *Loving,* 116 S. Ct. at 1744 (citing *Wayman v. Southard,* 23 U.S. (10 Wheat.) 1, 42 (1825)). Because the Line Item Veto Act properly safeguards the separation of powers, the Court should uphold the Act's delegation of Executive authority.

CONCLUSION

The Court should reverse the judgment of the district court.

Respectfully submitted,

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